

***United States Court of Appeals
for the Second Circuit***



APPENDIX

75-1312

B7c
p/s
By mail

To be argued by:
JONATHAN J. SILBERMANN

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA,

Appellee,

-against-

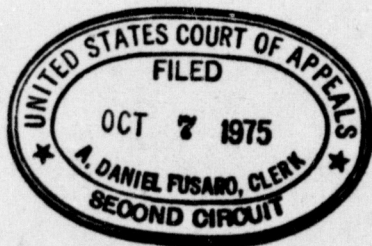
VINCENT INGENITO,

Appellant.

Docket No. 75-1312

APPENDIX TO APPELLANT'S BRIEF

ON APPEAL FROM A JUDGMENT
OF THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK



JONATHAN J. SILBERMANN,
Of Counsel.

WILLIAM J. GALLAGHER, ESQ.,
THE LEGAL AID SOCIETY,
Attorney for Appellant
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FEDERAL DEFENDER SERVICES UNIT
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PAGINATION AS IN ORIGINAL COPY

id engage in the business of selling firearms

DATE	PROCEEDINGS
2-3-75	Before Mishler, Ch J - Indictment filed
/5/75	By WEINSTEIN, J.- Order filed that case shall be pretried on 2/19/75 at 9:30 A.M.
2-19-75	Before WEINSTEIN J - case called - deft & counsel J. Seybert of Legal Aid present - deft arraigned and enters a plea of not guilty - defts motion to dismiss the indictment is denied pending ruling from the Court of Appeals. Pre Trial Conference held and concluded - deft O.R. trial set for March 21, 1975 at 10:00 am.
2/24/75	Magistrate's file 74 M 1647 inserted into CR file.
-14-75	Before WEINSTEIN J - case called - deft & counsel Marion Seltzer of Legal Aid present - defts application to adjourn the trial to May 8, 1975 is granted - deft waives right to a speedy trial.

75CR 91

DATE	PROCEEDINGS
5/8/75	Before WEINSTEIN, J.- Case called- Deft and counsel present- Trial ordered and begun- Jurors selected and sworn-Trial contd to 5/9/75 at 10:30 A.M.
5-9-75	Before WEINSTEIN J - case called - deft & counsel present - trial resumed - trial contd to May 12, 1975 at 9:30 am.
5-9-75	By WEINSTEIN J - Order of sustenance filed.
5-12-75	Before WEINSTEIN J - case called - deft & counsel present -trial resumed - Jury resumes deliberation at 9:30 am - jury returns and renders a verdict of guilty as charged - jury discharged - trial concluded - defts motion to set aside verdict is denied - sentence adjd without date - bail contd.
5-12-75	By WEINSTEIN J - Order of sustenance filed.
5-12-75	2 stenographers transcripts filed (pgs 1 to 256)
5-13-75	Stenographers transcript filed dated May 12, 1975
5-13-75	Voucher for Expert Services filed.
5/29/75	Stenographers Transcript dated 2/19/75 filed
8-22-75	Before WEINSTEIN J - case called - deft & counsel E.Kelly of Legal Aid present - deft sentenced to imprisonment for 3 years - stay of execution of sentence pending appeal granted.
8-22-75	Judgment & Commitment filed - certified copies to Marshal
8-22-75	Notice of Appeal filed
8-22-75	Docket entries and duplicate of Notice of Appeal, mailed to the Court of Appeals.
8/29/75	Order received from court of appeals that record be docketed on or before 9/5/75

A TRUE COPY
 DATED 8/25 1975
 LEWIS ORGEL
 BY [Signature] CLERK

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

-----X
UNITED STATES OF AMERICA

-VS-

VINCENT INGENITO,

Defendant
-----X

INDICTMENT

18 U.S.C. §922(a)(1)

75CR

91

FILED

IN CLERK'S OFFICE
U. S. DISTRICT COURT E.D. NY



FEB 3 1975

THE GRAND JURY CHARGES:

COUNT ONE


TIME A.M.


P.M.

Beginning on or about the 20th. day of June, 1974, until on or
about the 24th. day of June, 1974 in the Eastern District of New
York, the defendant, VINCENT INGENITO, knowingly did engage in the
business of dealing in firearms without being licensed to do so under
the provisions of Chapter 44, Title 18, United States Code.

(Title 18, United States Code, Section 922(a)(1))

A TRUE BILL


FOREMAN


DAVID G. TRAGER
United States Attorney
Eastern District of New York

4am

Charge of the Court

THE COURT: Ladies and Gentlemen, I am going to now tell you what the law is and I want you to follow these instructions.

You will decide the facts. Neither counsel nor I can do very much to help you further with that aspect of the trial.

I have no view as to the guilt or innocence of this defendant. Nothing that I have said or that I have done should indicate to you any such view on the matter.

Any of my rulings have nothing at all to do with guilty or innocence. They were based upon technical rules of no concern to you.

The fact the prosecution was brought in the name of the United States is entitled to no weight. Everybody is equal in this court. No one is entitled to any favor and no one is entitled to any sympathy.

As I have told you, this is an indictment that brings the defendant into court but it is no evidence and it entitled to no weight in your deliberations.

This defendant has pleaded not guilty. That means that the Government has the burden of proving guilt beyond a reasonable doubt with respect to every element of the offense, as I shall explain

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Charge

it to you in a moment.

A defendant does not have to prove his innocence. A defendant does not have to submit any evidence at all. He is presumed to be innocent. This burden of proof beyond a reasonable doubt lies on the Government throughout the trial and into your deliberations.

A reasonable doubt means a doubt sufficient to cause a prudent person to hesitate to act in the most important affairs of his or her life.

Now, this reasonable doubt can be instilled or arise in your mind not only from the evidence but also from the lack of evidence in the case. Obviously, finding a citizen to be guilty of a serious felony as this is, is a matter that will cause you to consider seriously whether or not you have a reasonable doubt.

The question of punishment or possible punishment is of no concern to you. Nevertheless, if you are convinced beyond a reasonable doubt that this defendant is guilty, you should find him guilty and not be swayed by any consideration of sympathy.

The law does not require certainty. You are going to have to rely upon your own common sense in

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1 3
2 evaluating this evidence, but if you have any question
3 about what was said, you can send a note in and we will
4 try to find that portion of the transcript and have
5 it read to you.

6 Obviously, we do not want to read the whole
7 trial over again so try to be precise, if you can.
8 I am not going to send in those weapons and the
9 other exhibits. If you want to examine them, you will
10 do that in front of me, for obvious reasons. There
11 is no point in having you have weapons with ammunition
12 in the jury room.

13 He is charged now with one count of crime
14 and I am going to read that count to you.

15 "Beginning on or about the 20th day of June,
16 1974, until on or about the 24th day of June, 1974,
17 the defendant Vincent Ingenito knowingly did engage
18 in the business of dealing in firearms without being
19 licensed to do so under the applicable U. S. Code
20 provisions."

21 The applicable statute reads as follows:

22 "It shall be unlawful for any person except
23 a licensed importer, licensed manufacturer or licensed
24 dealer to engage in the business of dealing in firearms.

25 Consider the statute in the charge and you

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will find that three elements will have to be proven beyond a reasonable doubt.

First, that from on or about June 20th, to and continuing until on or about June 24th, the defendant engaged in the business of dealing in firearms.

Second, that he did not have a Federal firearms license.

And third, that he acted knowingly and willfully.

Precise dates are not critical, obviously.

Now, as to the first and really most critical element, here, the Government must prove, beyond a reasonable doubt, that the defendant dealt in firearms without a Federal license.

The second defines the word dealer very broadly. It is, "... any person engaged in the business of selling firearms at wholesale or retail..." The law defines a dealer as one who is engaged in a business of selling firearms.

The law defines as a business as that which occupies time, attention and labor for the purpose of livelihood.

The use of the term wholesale or retail does

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Charge

not connote an open business. It can be clandestine and somewhat sporadic. A single sale or even a few sales would not be enough if the defendant did not plan to continue to obtain guns or parts and sell them to appropriate customers.

And an analogy might be a housewife who regularly for a short period of time supplements her income without her husband's knowledge by selling dresses that she has obtained from a manufacturer that she knows to a few neighbors or friends or for pin money or something like that to supplement her income.

She would in terms of the statute be engaged in the business of selling dresses.

It is not possession that the defendant is charged with but he is charged with engaging in the business of dealing in firearms and that is the central issue in this case.

The term firearm is defined "as any weapon which is designed to or may readily be converted to expel a projectile by means of an explosive."

There was testimony, you recall, here, that these two guns had been test fired, that they were capable of being used and in fact one of the guns,

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Charge

you remember, was sold fully loaded with shells, according to the testimony, at least.

Considering the second element, it must be shown that this defendant did not have a license. It has been stipulated, that is, agreed, that he did not have such a license.

Third, they have to prove that he acted knowingly and wilfully. A person does not knowingly do an act if his action resulted from a mistake or any other innocent reason. An act is willful if the defendant acted voluntarily and intentionally and with the specific intent to do something the law forbids. That is, with the bad purpose, to disobey the law, and here the bad purpose would be to engage in the dealing in firearms with out the required license.

This defendant asserts that he is a victim of entrapment as to the crime charged in the indictment. Where a person has no previous intent or purpose to violate the law but is induced or persuaded by law enforcement officers or their agents to commit a crime, he is a victim of entrapment and the law, as a matter of policy, forbids his conviction in such a case.

1 7
2 On the other hand, where a person already has
3 the readiness and willingness to break the law and
4 the mere fact, therefore, that the agents provided
5 what appeared to be a favorable opportunity to exist,
6 that is not entrapment.

7 For example, when the Government suspects
8 that a person is engaged in the illegal sale of
9 firearms, it is not entrapment for a government agent
10 to pretend to be someone else and to offer either
11 directly or through an informer or other decoy, to
12 purchase guns from such suspected person.

13 If you should find beyond a reasonable doubt
14 from the evidence in the case that before anything
15 else occurred respecting the alleged offense involved
16 in this case, the defendant was ready and willing to
17 commit a crime such as that charged in the indictment,
18 whenever the opportunity was afforded, and that the
19 Government officers or their agents did no more than
20 offer the opportunity then you should find that the
21 defendant was not a victim of entrapment.

22 On the other hand, if the evidence in the
23 case should leave you with a reasonable doubt
24 whether the defendant had the previous intent or
25 purpose to commit any offense of the character here

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Charge

charged and did so only because he was induced or persuaded by some officer or agent of the Government, then it is your duty to acquit him.

When the evidence shows inducement, then the Government must establish propensity-- that is, the desire to do this kind of thing -- beyond a reasonable doubt.

The Government can do that by showing an existing course of criminal conduct similar to that charged, a design already formed to commit the crime charged, willingness shown by ready response to inducement and so on.

The degree of pressure asserted is significant in your determination of propensity. Remember in this connection that the defendant himself testified that he when he went to see the agent, he had the guns in his possession on each occasion and was prepared to sell them.

A person who is arrested by the Government and subsequently agrees to work as an informant with the Government or its agents, while he may not be an official employee of the Government, is considered an agent of the Government for the purpose of this entrapment defense.

1
2 Mr. DuBois can be considered by you as part
3 of the Government apparatus for this purpose.

4 If you find that the defendant Vincent Ingenito
5 had no predisposition to deal in guns and that it was
6 Frank Davis or DuBois, the Government informant, who
7 enticed or entrapped him into the activity charged
8 in the indictment, then you should properly find the
9 defense of entrapment by a Government agent has been
10 established.

11 Remember, the defendant testified that DuBois
12 talked him into doing this and DuBois testified that
13 that is not at all how it occurred. Obviously, an
14 important aspect of your work in the jury room is to
15 determine the credibility of the witnesses before
16 you in weighing their testimony.

17 In weighing testimony, you may consider the
18 relationship of the witness to the Government; his bias
19 or interest in the outcome of the case; his manner
20 while he was testifying, as you observed it; his
21 intelligence, the extent to which what he says has been
22 corroborated or contradicted by other credible evi-
23 dence; inconsistencies within his own testimony,
24 whether he changed his testimony, whether he said other
25 things at other times inconsistent with what he said

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charge

on the witness stand.

This defendant has testified. Because of his obvious interest in the case, his evidence and credibility should be carefully considered by you. Testimony of an informer, which is what Mr. DuBois was, should also be carefully scrutinized by you, since he may be trying to obtain some advantage for himself in return for his testimony.

If you believe a witness has wilfully sworn falsely to you, you can ignore his testimony completely but you need not do so. He may have been telling the truth in part and have been mistaken in part. Each of you is entitled to your own opinion.

You should carefully and politely exchange views with each other. You should not hesitate to change your opinion if you think somebody else is right. Each of you has an individual responsibility to arrive at a verdict. That verdict must be unanimous. It will be either guilty or not guilty.

Your oath sums up your duty and that is, "Without fear or favor to any person, you will well and truly try the issues before these parties, according to the evidence given to you in court and

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Charge

the laws of the United States."

I am going to excuse the four alternates.

Thank you very much, Madam and gentlemen.

Do not discuss the case with each other or anybody else, is that clear, until after the verdict comes in.

You can go down.

Now, will counsel see me at the side bar, please.

(Four alternates excused.)

(the following occurred at side bar.)

THE COURT: Any requests or objections?

MISS SELTZER: No, your Honor.

MR. SLEPPIN: I have one additional. In U.S. v. Maniella, you charge that it is not necessary that this be the only business of the defendant or that it be a source of income from him.

MISS SELTZER: I object at this time, your Honor, to saying that because I think it's just drawing attention. While I didn't originally object to the Government's request to charge I think bringing it up at this point is emphasizing it.

(Open court.)

THE COURT: You remember the example I gave

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Charge

1 with respect to the housewife. Obviously, dealing
2 in arms doesn't have to be the only business or the
3 main source of income to the person involved. It
4 has to be a dealing, as I have defined it.
5

6 (At side bar.)

7 THE COURT: Anything further?

8 (In open court.)

9 THE COURT: All right. Swear the marshal,
10 please.

11 (Two male marshals were duly sworn by the
12 Clerk of the Court.)

13 THE COURT: All right, ladies and gentlemen,
14 retire and consider your verdict.

15 All right. I am going to send you out to lunch,
16 at Government expense, of course. So if you go in
17 and begin your deliberations, the marshals will try
18 to make arrangements and as soon as they have made
19 those arrangements, they will take you over to the
20 restaurant.

21 Begin your deliberations, please.

22 (The jury began their deliberations at
23 12:45 p.m. and the following occurred in their
24 absence.)

25 THE COURT: All right.

1 THE COURT: While you were out to lunch and
2 as the jury was leaving the building, I am informed one
3 of the jurors began to feel ill. As a result, on my
4 instructions the juror who felt ill was taken to the
5 nurse's quarters in the building and the other jurors
6 were brought up to the jury room where they were
7 instructed not to begin their deliberations and
8 instead of going out to lunch we brought sandwiches
9 and coffee in. Subsequently, the juror consulted with
10 his doctor in the presence of the Deputy Court Clerk
11 and one of the marshals and after the nurse had
12 reported his blood pressure and other vital signs.
13

14 The doctor indicated that he could go up and
15 continue deliberation and that there would be no
16 reason for him not to participate on the jury.

17 He then came up and I instructed the Clerk and
18 the Marshal that the jury was not to begin their
19 deliberation until I can get in touch with the
20 counselors. But I have not been able to get in touch
21 with the counselors until this moment, at ten minutes
22 to three.

23 Simultaneously I asked the jury clerk to call
24 by telephone the alternates and see if at least one of
25 them could get here. We have one of those alternates

2 1 waiting in the hall. Now, I instructed the alternate
2 not to discuss the case with anyone. I instructed the
3 jury not to deliberate. It is my understanding that
4 the jury did deliberate for ten to twenty minutes.

5 Their deliberations consisting, I am told by
6 the marshal, although I don't know his source of
7 information. I am trying to determine what they
8 wanted sent in from the court.

9 Now, you can consult with your clients and
10 decide what you want to do. If you wish, we can
11 excuse this juror and use the alternate in his place,
12 or permit the jury to continue, or handle it any way
13 you like. But I find -- would you like to discuss it
14 with your clients?

15 MS. SELTZER: Well, your Honor, I would like
16 to make one statement. When I was leaving the
17 building -- I wasn't here and I was not aware that
18 you instructed anyone not to talk to the alternate
19 and I believe was conversation with two of the
20 alternates.

21 THE COURT: I instructed in your presence on
22 the record. I instructed them not to discuss this
23 case with themselves or anyone else; this is my
24 practice. You discussed it with the jurors?

25 MS. SELTZER: Two of the alternates --

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THE COURT: Bring in the alternates. Bring

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in the alternates. They are in the hall.

3

Bring in the jury. You violated my instructions.

4

Don't do that again.

5

MS. SELTZER: I feel I am obligated to tell

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you --

7

THE COURT: What is your name, sir?

8

ALTERNATE JUROR NO. 1: Charles Dispensarry.

9

THE COURT: I really appreciate your coming

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back. Did you discuss this case with anyone of the

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counselors or with anybody else?

12

ALTERNATE JUROR NO. 1: No.

13

THE COURT: We may have a problem. We may

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need you if you don't mind. Would you wait in the hall.

15

ALTERNATE JUROR NO. 1: Yes.

16

THE COURT: Thank you. I appreciate your help.

17

What do you want to do?

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MS. SELTZER: We have no objection as to

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substituting the alternates.

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THE COURT: Bring in the juror.

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MS. SELTZER: If the gentleman wants to be

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excused -- I don't even know who it is. We certainly

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have no objection.

24

THE COURT: Bring in the juror that has the

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trouble.

4 1 (At this time Juror No. 2 entered courtroom.
2 Time noted: 4:00 o'clock.)

3 THE COURT: Sit down over there, sir. How do
4 you feel?

5 JUROR NO. 2: Very good.

6 THE COURT: What is your problem?

7 JUROR NO. 2: I suffer from blood pressure and
8 it had gotten a little too high.

9 THE COURT: Did you call a doctor?

10 JUROR NO. 2: I called a doctor and he said I
11 could finish up.

12 THE COURT: Do you take medication for that?

13 JUROR NO. 2: Yes, I do.

14 THE COURT: What medication?

15 JUROR NO. 2: I take pills for my blood
16 pressure.

17 THE COURT: Do you know what the name of the
18 pill is?

19 JUROR NO. 2: I have no idea. I just know the
20 color. I know that the color of the pills are green.
21 I also know that they are very small.

22 THE COURT: Did you take one today?

23 JUROR NO. 2: No, I had finished them Tuesday
24 and I called my doctor and told him -- I was supposed
25 to pick up some pills Wednesday. Two days ago. He

5 1 said when your duty is over then I will see you.

2 THE COURT: Well, I don't want you to be under.
3 any pressure because you know it can get pretty tense
4 sometimes in the jury room. So I think I am going to
5 excuse you.

6 So you can get right over to your doctor and
7 make this thing right. All right, if you wait here and
8 don't go into the jury room I can talk to the
9 counselors and see what they want to do.

10 JUROR NO. 2: All right.

11 THE COURT: Thank you very much.

12 (At this time the juror left the courtroom.)

13 (Time noted: 3:05.)

14 THE COURT: Do you have any objection to
15 excusing this juror?

16 MS. SELTZER: No objection.

17 MR. SLEPPIN: No objection.

18 MS. SELTZER: I think in the interest of
19 everybody it would be desirable because if he is
20 under any kind of pressure it just wouldn't help
21 anybody.

22 THE COURT: All right, come forward. I
23 don't see any point in swearing him in again. Do you?

24 MS. SELTZER: No.

25

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1 MR. SLEPPIN: No, he was sworn already.

2 THE COURT: You understand that you have been
3 sworn in as a juror?

4 ALTERNATE JUROR NO. 1: Yes.

5 THE COURT: You heard all of the instructions
6 and the evidence and the arguments?

7 ALTERNATE JUROR NO. 1: Yes.

8 THE COURT: Is there any reason why you cannot
9 begin your deliberation with the jury?

10 ALTERNATE JUROR NO. 1: No, I don't think so.

11 THE COURT: All right, wait outside now for just
12 a second, please.

13 Do you want me to call the jury in and explain
14 it or just send him in?

15 MS. SELTZER: I think you should explain it,
16 your Honor.

17 THE COURT: All right, bring in the sick man.

18 (At this time the Juror No. 2 was brought in.)

19 (Time noted: 3:08.)

20 THE COURT: Do you have a coat here?

21 JUROR NO. 2: No.

22 THE COURT: Why don't you go out here and just
23 go downstairs? I am sure you will be all right. I am
24 sure your blood pressure will be all right. And I
25 appreciate your help.

7 (At this time Juror No. 2 was excused.)

1 (Time noted: 3:09.)

2 (At this time jury entered courtroom.)

3 (Time noted 3:10.)

4
5 THE COURT: Sit down everybody. Did you enjoy
6 your lunch?

7 Alternate Juror No. 1, did you have lunch?

8 ALTERNATE JUROR NO. 1: Yes.

9 THE COURT: You did?

10 ALTERNATE JUROR NO. 1: Yes, I did.

11 THE COURT: Would you step into juror's No. 2
12 seat, please?

13 ALTERNATE JUROR NO. 2: Surely.

14 (At this time Alternate Juror No. 1 proceeded
15 to take Juror's seat No. 2.)

16 (Time noted: 3:11.)

17 THE COURT: Is there any objection to asking
18 the jury to go out and deliberate?

19 MS. SELTZER: No, I would appreciate it if you
20 explain what is going on.

21 THE COURT: I relieved the other juror because
22 he had a little problem and there is no reason for him
23 or you to be under any tension. So I excused him.

24 All right, continue your deliberations.

25 (At this time, the jury left the courtroom.)

8 1 (Time noted: 3:12.)

2 THE COURT: All right, thank you very much. We
3 will let you know.

4 MS. SELTZER: Thank you.

5 (At this time a recess was taken. Time noted
6 3:13.)

7 (Court resumed.)

8 (Time noted: 3:32 p.m.)

9 (Note received from the jury.)

10 THE COURT: All right, you want me to read from
11 the last paragraph on page 4, and then page 5, and then
12 page 6, and 6B, and 6C and 6D; is that correct? With
13 the insert on page 5 that was requested in the charge
14 by the Government.

15 MR. SLEPPIN: That's correct.

16 MS. SELTZER: Yes, your Honor, that sounds
17 right.

18 THE COURT: Just for the record, so there is no
19 question about it. At the time that I asked before
20 about substituting the juror, the defendant was present
21 himself and so was counsel and by nodding observedly he
22 agreed that was the proper thing to do; is that correct?

23 MS. SELTZER: Yes.

24 THE DEFENDANT: Yes.

25 THE COURT: And you waived any possible

9 1 objection that the right grounds of trial by jury was
2 violated; is that correct?

3 MS. SELTZER: Yes, your Honor.

4 THE COURT: Bring in the jury.

5 THE CLERK: Court Exhibit 7, note received from
6 the jury.

7 (Jury entered courtroom.)

8 (Time noted: 3:35 p.m.)

9 THE COURT: I have tried to locate, with the
10 assistance of counsel, the material you wanted read and
11 I will read it to you. First, what constitutes a
12 dealer;

13 (Reading from charge.)

14 THE COURT: "The Government must prove beyond
15 a reasonable doubt that the defendant dealt in fire-
16 arms, without a federal license. The statute defines
17 the word "dealer" very broadly as "any person engaged
18 in the business of selling firearms...at wholesale or
19 retail."

20 The law defines a dealer in firearms as one
21 who is engaged in a business of selling firearms. The
22 law defines a business as that which occupies time,
23 attention and labor for the purpose of livelihood or
24 profit. The defendant must have shown to have engaged
25 in the business of dealing in firearms.

10 1 It is not necessary that this be the only
2 business of the defendant or that it be the significant
3 source of his income for him.

4 The use of the terms "wholesale" or "retail"
5 does not necessarily have the connotation of an open
6 business. It can be clandestine and somewhat sporadic.
7 A single sale or even a few sales would not be enough
8 if the defendant did not plan to continue to obtain
9 guns or gun parts and sell them to appropriate
10 customers. An analogy might be a housewife who
11 regularly supplements her income without her husband's
12 knowledge by selling dresses that she has obtained from
13 a manufacturer she knows to a few neighbors or friends.
14 She would be, in terms of the statute, engaged in the
15 business of dealing in dresses.

16 It is not possession but engaging in the
17 business of dealing in firearms that is the central
18 element of the crime.

19 (At this time the Court discontinued reading
20 from the charge.)

21 THE COURT: Now, you also asked me about
22 entrapment.

23
24 (continued next page)
25

1/2

1 THE COURT: (Reading from Charge) "Where a
2 person has no previous intent or purpose to violate
3 the law but is induced or presumed by law enforcement
4 officers or their agents to commit a crime, he is a
5 victim of entrapment and the law as a matter of policy
6 forbids his conviction in such a case.

7 "On the other hand, where a person already has
8 the readiness and willingness to break the law, the
9 mere fact that the government agents provide what
10 appears to be a favorable opportunity is not entrapment.
11 For example, when the Government suspects that a person
12 is engaged in the illegal sale of firearms, it is not
13 entrapment for the Government agent to pretend to be
14 someone else and to offer, either directly or through
15 an informer or other decoy, to purchase guns from such
16 suspected person.

17 "If, then, you should find beyond a reasonable
18 doubt from the evidence in the case that before anything
19 at all occurred respecting the alleged offense involved
20 in this case, the defendant was ready and willing to
21 commit a crime such as that charged in the indictment,
22 whenever opportunity was afforded, and that government
23 officers or their agents did no more than offer the
24 opportunity, then you should find that the defendant
25 is not a victim of entrapment.

1 "On the other hand, if the evidence in the case
2 should leave you with a reasonable doubt whether the
3 defendant had the previous intent or purpose to commit
4 any offense of the character here charged and did so
5 only because he was induced or persuaded by some
6 officer or agent of the Government, then it is your
7 duty to acquit him.

8 ". . . When the evidence shows inducement, then
9 the Government must establish propensity beyond a
10 reasonable doubt. Among the methods of proof available
11 are (1) an existing course of criminal conduct similar
12 to the crime charged; (2) a design already formed to
13 commit the crime charged; or (3) willingness shown
14 by ready response to inducement. The degree of pressure
15 exerted . . . is significant in the jury's determination
16 on the issue of propensity.

17 "A person who was arrested by the Government
18 and subsequently agrees to work as an informant with
19 the Government or its agents, while he may not be an
20 official employee of the Government, is considered an
21 agent of the Government, for the purpose of this
22 entrapment.

23 "If you find that the defendant Vincent Ingenito
24 had no predisposition to deal in guns and that it was
25 Frank Davis, the government informant, who enticed or

1 entrapped him into the activities charged in the indict-
2 ment, then you should properly find that a defense of
3 entrapment by the Government agent has been established.

4 (Reading of the charge concluded.)

5 THE COURT: Do you wish to see me sidebar?

6 MS. SELTZER: No, your Honor.

7 THE COURT: Do you?

8 MR. SLEPPIN: No, your Honor.

9 THE COURT: All right, thank you. You can bring
10 the jury inside.

11 (Jury out.)

12 THE COURT: All right, attorneys, come to side-
13 bar, please.

14 (Sidebar discussion:)

15 THE COURT: You are both young attorneys and I
16 wonder how you both did the same thing today. When
17 you have a charge in advance and the particular charge
18 is being repeated, you should have that charge open
19 before you so you follow the Court and see what the
20 Court is doing in case the Court misses or makes a
21 mistake or misspeaks or puts something in that is
22 prejudicial to your client.

23 Now, both of you just stared into space as if
24 you were here as interested observers. You should be
25 careful to check these things.

1 MR. SLEPPIN: Your Honor, I was reading along
2 along with you and I see you made a change or two, but
3 it was in accordance with the charge.

4 THE COURT: But you ought to watch that. Ms.
5 Seltzer, I know you weren't paying attention. I made
6 some changes, you should have picked them up.

7 MS. SELTZER: I know you made changes and I don't
8 think they were improper.

9 THE COURT: I depend upon counsel to pick these
10 things up. So, okay, is there anything else?

11 MS. SELTZER: No, your Honor.

12 MR. SLEPPIN: No, your Honor.

13 THE COURT: How long do you want to keep the jury
14 in?

15 MS. SELTZER: I have tickets to see Bett Midler
16 at 10:30 tonight.

17 THE COURT: I don't think we will keep them until
18 10:30. I don't think I will bring them in tomorrow.
19 Do you think there is any point in that?

20 MR. SLEPPIN: It is up to you, your Honor. I
21 could come in if your Honor wishes me to.

22 THE COURT: Well --

23 MS. SELTZER: My feeling is to let them sit to --
24 how long will you keep them in there?

25 THE COURT: I will keep them in there at least

1 another two hours and we will see what happens.

2 Okay, let the clerk know where you are.

3 MR. SLEPPIN: Thank you, your Honor.

4 Your Honor, I just have one thing -- my agent
5 told me -- the case agent in this case informed me that
6 the vault containing the weapons is locked up around
7 five-thirty.

8 THE COURT: Then lock them up. I am sure I am
9 not going to send it in to the jury anyway.

10 Is that appropriate to the defendant?

11 MS. SELTZER: No, your Honor.

12 (At this time a recess was taken.)

13 (Time noted: 4:36 p.m.)

14 (Note received from jury as Court's exhibit 8,
15 time noted 5:10.)

16 THE COURT: Do you have any objections to my
17 sending a typed script of this charge to the jury?

18 MS. SELTZER: Yes, your Honor.

19 THE COURT: All right, call in the jury and I
20 will read it to them.

21 MS. SELTZER: Your Honor, I don't particularly
22 like the analogy about the lady with the dress.

23 THE COURT: I don't care for it either since
24 there is only one lady on the jury.

25 (Jury enters courtroom.)

1 (Time noted 5:15 p.m.)

2 THE COURT: I am not going to send anything in
3 writing in to you. I will do it in court. If you
4 don't find the analogy that I gave you helpful, forget
5 it. It is not particularly useful, perhaps. But if
6 you want me to read you the charge on dealers I will
7 read it again. Is that what you want me to do?
8 Remember, what we have before us in the charge is that
9 within a four-day period he was a dealer. Do you un-
10 derstand that?

11 On June 20th to June 24th, for those four days
12 only. During those four days the Government must prove
13 beyond a reasonable doubt that the defendant dealt in
14 firearms.

15 (The Court commences to read from the charge
16 as follows:)

17 "The Code defines a 'dealer' very broadly as
18 'any person engaged in the business of selling firearms,
19 -- at wholesale or retail.' The law defines a dealer
20 in firearms as one who is engaged in a business of
21 selling firearms. The law defines a business as that
22 which occupies time, attention and labor for the purpose
23 of livelihood or profit. The defendant must have been
24 shown to have engaged in the business of dealing in
25 firearms.

1 "It is not necessary that this be the only busi-
2 ness of the defendant or that it be a significant source
3 of income for him.

4 "The use of the terms 'wholesale' or 'retail'
5 does not necessary have the connotation of an open
6 business. It can be clandestine and somewhat sporadic.
7 A single sale or even a few sales would not be enough
8 if the defendant did not plan to continue to obtain
9 guns or gun parts and sell them to appropriate custo-
10 mers. An analogy might be a housewife who regularly
11 supplements her income without her husband's knowledge
12 by selling dresses that she has obtained from a manu-
13 facturer she knows to a few neighbors or friends.
14 She would be in terms of the statute engaged in the
15 business of dealing in dresses. It is not possession
16 but engaging in the business of dealing in firearms
17 that is the essential element of the crime."

18 All right, retire and reconsider now.

19 (Jury leaves courtroom. Time noted 5:20 p.m.)

20 THE COURT: We have to get a different analogy,
21 I don't like that one. The last time we used it we
22 had a jury of women. Do you know of any good analogies?
23 Do you know of any good analogies, for men?

24 MR. SLEPPIN: How about the man who scalps
25 baseball tickets?

1 THE COURT: Stolen watches?

2 Maybe we ought not to say anything about analo-
3 gies. It is a very difficult concept and I think the
4 law deliberately leaves it vague and this defendant
5 falls in the gray area. That is the problem.

6 All right, it is 5:25, we will let them sit for
7 another hour or so. They want more paper.

8 THE CLERK: It was handed in, Judge.

9 THE COURT: Okay.

10 (At this time court recessed; time noted 5:25 p.m.)

11 (Court resumed at 6:20 p.m.)

12 THE COURT: I am going to call in the jury and
13 see what they want to do.

14 Bring in the jury.

15 (At this time jury entered courtroom.)

16 THE COURT: Well, ladies and gentlemen, it is
17 6:21 and I would be delighted to stay longer if you like
18 or if you want you can go home and come back Monday and
19 continue deliberation on Monday, after you had a weekend
20 of rest.

21 JUROR NO. 1: We have something we would like
22 to have reread and I think we can think on it and come
23 back Monday morning. But we would like something read
24 back.

25 THE COURT: What do you want reread?

1 JUROR NO. 12: May I say something? May we have
2 it read back Monday morning so that it will be fresh
3 in our minds rather than have it read back now.

4 THE COURT: Why don't you go in and see if you
5 can reach a decision on this and if you want something
6 read back tonight or Monday morning, just tell us what
7 you want in writing.

8 JUROR NO. 1: I wrote it down already. I already
9 wrote down what we want read back.

10 THE COURT: You wrote it down?

11 JUROR NO. 1: Yes.

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13 (Continued on next page.)
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1 THE COURT: Give it to the Marshal and he
2 will give it to me and go inside and decide what
3 you want to do.

4 (At this time, the jury left the courtroom.)

5 (Time noted: 6:28 p.m.)

6 (Note handed to the Court by the jury
7 at 6:28 p.m.)

8 MS. SELTZER: Is there any possibility of
9 bringing back the jury tomorrow? I personally am
10 opposed to bringing them back Monday.

11 THE COURT: I can bring them back tomorrow.

12 MS. SELTZER: Unless they are violently
13 opposed to it themselves.

14 THE COURT: I think after a full week of work
15 it probably would be better if they were to go home
16 and come back Monday and get a good weekend of rest.

17 The note reads that they want the testimony
18 read back of the ride to Canal Street where they
19 produced the gun from under the seat.

20 MR. SLEPPIN: Who was the owner of that car?
21 That was Vincent's testimony on the morning of the
22 20th? Do you remember that testimony?

23 MS. SELTZER: I don't understand it.

24 THE COURT: Mark the note and look at it
25 please.

AF:jm
TlomR3

1 THE CLERK: Note marked Court Exhibit
2 number 9.

3 (So marked.)

4 THE COURT: I myself thought that the
5 defendant also testified to that.

6 MR. SLEPPIN: I think he did testify from
7 Canal Street before they talked about Myrtle Avenue.

8 MS. SELTZER: "Gun from under the seat."
9 The testimony was that. My client took the gun from
10 under the seat when he brought it out to the agent,
11 I believe. I think that is it; is that correct, the
12 firearm you brought out was under the seat -- if
13 that is what they are referring to.

14 THE COURT: That was not on the trip to
15 Canal Street.

16 MS. SELTZER: Canal Street -- when
17 Mr. Ingenito was testifying -- this was Vincent's
18 testimony on the morning of the 20th.

19 THE COURT: I take it that is after the
20 defendant got into the car and drove to Canal Street.
21 Surely that was the defendant's car.

22 THE WITNESS: That was my car, your Honor.

23 THE COURT: Well, see if you can find it.
24 See if you can find it in case they want it read
25 back tonight. I believe that was on direct examination.

1 MS. SELTZER: Your Honor, unless for some
2 reason it is difficult for you, is it possible to
3 ask them about coming back tomorrow? Unless it is
4 difficult for you. Just think, to have a trial for
5 two days and to have it laid over for the period
6 longer than the trial, I don't know how good their
7 memories are.

8 THE COURT: Well, we have a problem with the
9 court reporter.

10 (At this time, the Court conferred with the
11 court reporter.)

12 MS. SELTZER: It starts around Page 86 or 87.

13 (At this time the court reporter took a break.)

14 (Time noted: 6:32 p.m.)

15 (Court reporter returned.)

16 (Time noted: 6:37 p.m.)

17 (Note received from jury.)

18 (Time noted: 6:37 p.m.)

19 THE COURT: Have you agreed to what is to be
20 read?

21 MR. SLEPPIN: Yes, and they sent out a note.
22 They would like to hear it now.

23 THE COURT: What are you going to have that
24 read?

25 THE CLERK: Judge, I will mark it as

1 Court Exhibit 9.

2 (Note marked as Court Exhibit 10.)

3 MR. SLEPPIN: Your Honor, I will have to
4 inform them that the defendant never testified that
5 he took it out of the back seat of the car. I will
6 have to tell them that both agents testified to that
7 and that we have both of those pages marked off and
8 as far as Canal Street and Mr. Ingenito --

9 THE COURT: Do you have the exact line?

10 MS. SELTZER: Page 86, Line 2 to 6.

11 (At this time, the jury entered the courtroom.)

12 (Time noted: 6:35 p.m.)

13 THE COURT: You say here on this note, Court
14 Exhibit 9 -- the gun was produced from under the
15 seat. The defendant didn't testify to that. The
16 agent, so testified, that the gun was produced from
17 the back seat.

18 MR. SLEPPIN: Yes, your Honor.

19 THE COURT: The car was owned by the
20 defendant. Now, I will read you the testimony on
21 the morning of the 20th. You are probably referring
22 to that. The defendant said on his testimony that
23 Mr. DuBois met him, the defendant, at the defendant's
24 house and that the defendant in his own car drove
25 Mr. DuBois to Manhattan.

1 Page 86, Line 3, this is the answer of the
2 defendant on direct examination.

3 "Answer: In the car. He had a few bags with
4 him. He had some bags with him, with grapes. He was
5 always buying fruit or something, you know, something
6 with sugar in it, bread.

7 "So I didn't think nothing of it.

8 "Question: Well, when was it that he told you
9 or where were you when he told you that he wanted
10 you to help him?

11 "Answer: I think we were in the New York. I
12 had drove him over to the Exchange. Yes. I drove
13 him over there. And that is when he told me about it.

14 "So I went along with it. Had I had time to
15 think about it, you know, I don't know, maybe I
16 wouldn't have done it. But as it was there, the time
17 was ripe and I was broke, I went along with it.

18 "Question: Where did the gun come from?

19 "Answer: That I don't know.

20 "Question: Well, did he have it in his pocket
21 or -- you didn't produce the gun, did you?

22 "Answer: No. I didn't have no gun.

23 "Question: Where did the gun come from?

24 "Answer: Well, he must have had it in one of
25 the bags because he gave it to me and I put it in

1 that bag.

2 "Question: Where was that bag?

3 "Answer: In the back of my car.

4 "Question: You went from Brooklyn to New
5 York, right, to the Diamond Exchange?

6 "Answer: Yes.

7 "Question: What street? 47th Street?

8 "Answer: No, no, downtown. Downtown near
9 Chinatown.

10 "Question: At what point was it that he
11 pulled a gun out and he gave it to you? Was it before
12 you --

13 "Answer: We had to be already in New York
14 because I didn't know anything about it. And he
15 went away somewhere and came back.

16 "When he came back he says, 'I know where we
17 can makr some money.'

18 "Question: Did he go to make a telephone
19 call, do you know?

20 "Answer: I really don't know.

21 "Question: You don't know if he was in
22 communication with any agent?

23 "Answer: I was sitting in the car, you see.
24 When he would come down, even though he would only
25 spend a short time with me -- he wouldn't spend the

1 whole day with me. He would spend the morning and
2 about two or three o'clock in the afternoon I would
3 either drop him off by the train or take him out to
4 where he lived in Sheepshead Bay. This is how I got
5 involved with him. He had no car. This is what he
6 told me.

7 "Question: Was it around Canal Street?

8 "Answer: Canal Street, right.

9 "Question: And was it after you left Canal
10 Street that he pulled the gun out and you put it in--

11 "Answer: We were on Third Avenue, right.

12 "Question: Where did you go from there?

13 "Answer: Then we went over to Junior's to
14 eat, you see. All the while he told me, he says, I
15 know this fellow. Don't worry. He's a gun collector.
16 You aren't going to get into any trouble. I don't
17 do it myself because I owe him money. And I said I
18 will be on it, you know.

19 "Question: And you ate at Junior's first?

20 "Answer: We ate first.

21 "Question: Then what did you do?

22 "Answer: Then we met this fellow in the
23 parking lot.

24 "Question: This fellow was the agent at
25 that time?

1 "Answer: He was introduced as Tony.

2 "Question: Who introduced him?

3 "Answer: Frank introduced Mr. Aversano as
4 Tony.

5 "Question: And then what did he do?

6 "Answer: Then he went away. He walked away.
7 When he came back he said, 'You got the money?'

8 "I said, 'Yes.'

9 "I gave him the money.

10 "He said, 'I want to get a drink. I am warm.'
11 It was very warm. It was June.

12 "He handed me twenty-five dollars."

13 (At this time, the Court dispensed reading
14 from the transcript.)

15 THE COURT: Is that what you wanted read?

16 JUROR NUMBER ONE: Yes.

17 THE COURT: All right, thank you.

18 Now, what do you want to do?

19 JUROR NUMBER ONE: We would like that short
20 time.

21 THE COURT: Okay, take as much time as you
22 would like.

23 (At this time the jury left the courtroom.)

24 (Time noted: 6:45 p.m.)

25 THE COURT: Is there anything else counsel

1 would like me to read or say?

2 MR. SLEPPIN: No, your Honor.

3 MS. SELTZER: No, your Honor.

4 (Court recessed at 6:45 p.m.)

5 (Court resumed at 7:20 p.m.)

6 THE COURT: All right, bring in the jury.

7 (At this time the jury entered the courtroom.)

8 (Time noted: 7:21 p.m.)

9 THE COURT: I understand you would like to
10 come back Monday. Now, we will start at 9:30 on
11 Monday. Please, if any of you are not here, we are
12 going to have to try this whole case again. So, try
13 to be here promptly at 9:30. Don't begin your
14 deliberation until everybody is present and don't
15 discuss the case with anybody at home or do any
16 researching or looking over of the places where this
17 happened. Also, don't ask anybody about guns and
18 have a very pleasant weekend and come back rested on
19 Monday. Good night.

20 (At this time the jury recessed until
21 Monday morning, May 12th, 1975.)

22 (Time noted: 7:25 p.m.)

23 THE COURT: Okay.

24 MS. SELTZER: Your Honor, you didn't tell them
25 what time to come back.

1 THE COURT: 9:30, Good night everybody. Have
2 a pleasant weekend.

3 MS. SELTZER: Good night.

4 MR. SLEPPIN: Good night.

5 (At this time the Court recessed until
6 9:30 Monday morning, May 12th, 1975.)
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1 (The following occurred in the absence of
2 the jury.)

3 (Document referred to was received and marked
4 Court's Exhibit 12.)

5 THE COURT: Gentlemen, I have this note from
6 the jury, Court's Exhibit 12. It has been shown to
7 counsel. Counsel have consulted with each other and
8 they have agreed, as I understand it, that page 129
9 line 8 to page 132 line 7; page 133 line 14 to
10 page 135 line 24; page 100 line 25 to page 101 line 20;
11 page 103 line 20 to page 104 line 10; and the charge
12 pages 6b, 6c and 6d will be read.

13 Is that correct?

14 MR. SLEPPIN: Yes, your Honor.

15 MS. SELTZER: Yes.

16 THE COURT: Bring the jury in, please.

17 (The jury thereupon returned to the courtroom.)

18 THE COURT: Good morning, madam and gentlemen,
19 we have selected the material that we think that you
20 want. And the reporter will now read it to you.

21 (Record read as indicated.)

22 THE COURT: Where a person has no previous
23 intent or purpose to violate the law, but is induced
24 or persuaded by law enforcement officers or their
25 agents to commit a crime, he is the victim of

1 entrapment, and the law as a matter of policy
2 forbids his conviction in such a case.

3 On the other hand, where a person already has
4 the readiness and willingness to break the law, the
5 mere fact that the Government agents provide what
6 appears to be a favorable opportunity is not entrap-
7 ment. For example, when the Government suspects that
8 a person is engaged in the illegal sale of firearms,
9 it is not entrapment for a Government agent to pretend
10 to be someone else and to offer, either directly or
11 through an informer or other decoy, to purchase
12 guns from such a suspected person.

13 If, then, you should find beyond a reasonable
14 doubt from the evidence in the case that, before any-
15 thing at all occurred respecting the alleged offense
16 involved in this case, the defendant was ready and
17 willing to commit a crime such as that charged in
18 the indictment, whenever opportunity was afforded,
19 and that Government officers or their agents did no
20 more than offer the opportunity, then you should find
21 that the defendant is not a victim of entrapment.

22 On the other hand, if the evidence in the case
23 should leave you with a reasonable doubt whether the
24 defendant, had the previous intent or purpose to
25 commit any offense of the character here charged,

1 and did so only because he was induced or persuaded
2 by some officer or agent of the Government, then it
3 is your duty to acquit him.

4 When the evidence shows inducement, then the
5 Government must establish propensity, and it must
6 do that beyond a reasonable doubt. Among the methods
7 of proof to establish propensity are an existing
8 course of criminal conduct similar to the crime
9 charged; a design already formed to commit the
10 crime charged; or willingness shown by ready response
11 to the inducement. The degree of pressure exerted
12 is significant in your determination of propensity.

13 A person who was arrested by the Government
14 and subsequently agrees to work as an informant with
15 the Government or its agents, while he may not be an
16 official employee is considered an agent for the
17 purposes of this entrapment defense.

18 That refers to Mr. DuBois.

19 If you find that the defendant Vincent Ingenito
20 had no predisposition to deal in guns and that it was
21 Frank DuBois the Government informant who enticed
22 or entrapped him into the activities charged in the
23 indictment, then you should properly find that a
24 defense of entrapment by a Government agent has been
25 established. If you should find to the contrary

1 beyond a reasonable doubt you should find no entrapment.

2 All right, you may retire, ladies and gentlemen.

3 (The jury thereupon retired from the courtroom.)

Department of Justice

Washington 20530

September 28, 1972

Mr. David J. Ritchie
Criminal Division
Department of Justice
Washington, D. C.

Dear Mr. Ritchie:

As an attorney and counselor at law you are hereby specially retained and appointed as a Special Attorney under the authority of the Department of Justice to assist in the trial of the case or cases growing out of the transactions hereinafter mentioned in which the Government is interested. In that connection you are specifically directed to file informations and to conduct in the Eastern District of New York and in any other judicial district where the jurisdiction thereof lies any kind of legal proceeding, civil or criminal, including grand jury proceedings and proceedings before committing magistrates, which United States Attorneys are authorized by law to conduct.


The Department is informed that various persons, companies, corporations, firms, associations, and organizations to the Department unknown have violated in the above-named district and in other judicial districts the laws relating to extortion in aid of racketeering (18 U.S.C. 1951), embezzlement of union funds (29 U.S.C. 501(c)) and the funds of welfare and pension plans (18 U.S.C. 664), payments by employers to their employees and to officials of labor organizations (29 U.S.C. 186), the filing of reports and the maintenance of records by unions and union officials (29 U.S.C. 439), deprivation of the rights of a union member by force (29 U.S.C. 530), obstruction of justice (18 U.S.C. 1503), obstruction of criminal investigations (18 U.S.C. 1510), obstruction of state or local law enforcement (18 U.S.C. 1511), travel and transportation in aid of racketeering (18 U.S.C. 1952), transmission of bets, wagers, and related information by wire communications (18 U.S.C. 1084), interstate transportation of wagering paraphernalia (18 U.S.C. 1953), prohibition of illegal gambling businesses (18 U.S.C. 1955), racketeer influenced and corrupt organizations (18 U.S.C. 1962), perjury (18 U.S.C. 1621), false declarations (18 U.S.C. 1623), mail fraud (18 U.S.C. 1341), fraud by wire (18 U.S.C. 1343), interstate transportation of stolen property (18 U.S.C. 2314), wire and radio communication (47 U.S.C. 203 and 501), internal revenue (26 U.S.C. 7201-7206), and other criminal laws of the United States and have conspired to commit all such offenses in violation of Section 371 of Title 18 of the United States Code.

- 2 -

You are to serve without compensation other than the compensation you are now receiving under existing appointment.

Please execute the required oath of office and forward a duplicate thereof to the Criminal Division, Department of Justice.

Sincerely,


HENRY E. PETERSEN
Assistant Attorney General

OATH OF OFFICE (Without Compensation)

OCT 3 3 39 PM '72

I, DAVID J. RITCHIE ^{CLERK, do solemnly}
^{U.S. DISTRICT COURT}
^{EASTERN DISTRICT}
swear that I will support and defend the Constitution of the United States
against all enemies, foreign and domestic; that I will bear true faith and
allegiance to the same; that I take this obligation freely, without any
mental reservation or purpose of evasion; and that I will well and faith-

fully discharge the duties of the office of Special Attorney under
letter of appointment dated September 28, 1972 authorizing me to assist
in presentation to the grand jury and trial of the case or cases in
the Eastern District of New York in which the Department is informed that
various persons, companies, corporations, firms, associations, and organ-
izations to the Department unknown have violated in the above-named
district and in other judicial districts laws relating to extortion in aid
of racketeering (18 U.S.C. 1951), embezzlement of union funds (29 U.S.C.
501(c)) and the funds of welfare and pension plans (18 U.S.C. 664), etc.,
as set forth in letter of appointment dated September 28, 1972,

on which I am about to enter: So help me God.

(Sign here)

David J. Ritchie

Date of Birth Sept 19, 1946

Date of entry upon duty Oct 3, 1972

Subscribed and sworn to before

me this 3rd day

of October A. D., 1972, at Brooklyn New York
(City and State)

Lewis Orgel

(Signature of Officer)

(Seal)

Clerk, US DISTRICT COURT, EDNY
(Title)

NOTE - If the certificate is executed by a Notary Public, the date of
expiration of his commission should be shown.

Mr
8/4/75

F.Y.I.

re: Persico

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

----- X

UNITED STATES OF AMERICA

-against-

WILLIAM F. O'GORMAN,

Defendant.

73 CR 440

MEMORANDUM
AND ORDER

----- X

A P P E A R A N C E S :

DAVID G. TRAGER
United States Attorney
Eastern District of New York
By: David J. Ritchie
Special Attorney
Organized Crime Section
Department of Justice
Attorney for the United States
of AMERICA

WILLIAM GALLAGHER, ESQ.
Federal Defender Services Unit
The Legal Aid Society
26 Court Street, Room 701
Brooklyn, New York 11242
By: Edward J. Kelly, Esq.

WATSON, D. J.

Defendant has moved pursuant to Rule 12(b)(2) of the Federal Rules of Criminal Procedure for the dismissal of this indictment on the ground the special attorney of the Department of Justice who presented this case to the Grand Jury was not authorized to do so.

This raises the question of whether the special attorney's commission permitted him to present evidence to the Grand Jury of the crime of making false statements in loan applications in violation of 18 U. S.C. §§1010 and 1014, which are the crimes charged in the remaining counts Three, Six, Nine and Ten.

The commission in question reads as follows:

OFFICE OF THE DEPUTY ATTORNEY GENERAL

Washington, D. C. 20530

August 13, 1970

Mr. James O. Druker
Criminal Division
Department of Justice
Washington, D. C.

Dear Mr. Druker:

As an attorney and counselor at law you are hereby specially retained and appointed as a Special Attorney under the authority of the Department of Justice to assist in the trial of the case or cases growing out of the transactions hereinafter mentioned in which the Government is interested. In that connection you are specifically directed to file informations and to conduct in the Eastern District of New York and in any other

judicial district where the jurisdiction thereof lies any kind of legal proceeding, civil or criminal, including grand jury proceedings and proceedings before committing magistrates, which United States Attorneys are authorized by law to conduct.

The Department is informed that various persons, companies, corporations, firms, associations, and organizations to the Department unknown, have violated in the above-named district and in other judicial districts the laws relating to extortion in aid of racketeering (18 U.S.C. 1951), travel and transportation in aid of racketeering (18 U.S.C. 1952), transmission of bets, wagers, and related information by wire communications (18 U.S.C. 1084), interstate transportation of wagering paraphernalia (18 U.S.C. 1953), perjury (18 U.S.C. 1621), mail fraud (18 U.S.C. 1341), fraud by wire (18 U.S.C. 1343), interstate transportation of stolen property (18 U.S.C. 2314), wire and radio communication (47 U.S.C. 203 and 501), internal revenue (26 U.S.C. 7201-7206), and other criminal laws of the United States and have conspired to commit all such offenses in violation of Section 371 of Title 18 of the United States Code.

You are to serve without compensation other than the compensation you are now receiving under existing appointment.

Please execute the required oath of office and forward a duplicate thereof to the Criminal Division, Department of Justice.

Sincerely,

Richard G. Kleindienst
Deputy Attorney General

The recent opinion in In Re Grand Jury Subpoena of Alphonse Persico No. 75-2030 (CA 2d June 19, 1975) makes it clear that the appointment of a special attorney in general terms to conduct "any kind of legal proceedings" in connection with "violations of federal criminal statutes" was valid under the terms of 28 U.S.C. §515(a). While the decision does manifest a strong tendency to uphold the grants of authority in

these commissions, it did not rule out the possibility that a narrowly drawn commission might create problems of authority. In fact, the Court of Appeals specifically pointed out this possibility (slip opinion, page 4172).

I believe the commission before me is just such a specific and narrow authorization. It appoints the special attorney to assist in cases growing out of ten specific categories of criminal offenses no one of which relates to making false statements on loan applications.

The government stresses the inclusion, after the specific enumeration, of the phrase "and other criminal laws of the United States." It hardly seems plausible that a detailed list of ten criminal "transactions" would be included in a commission intended to grant authority to proceed against any violation of a criminal law of the United States. At best, the final phrase might support the inclusion of crimes related in some manner to those enumerated. Cf. United States v. Powell 81 F. Supp. 288, 291 (E.D. Mo. 1948) However, there is no indication in the indictment or otherwise that such is the case.

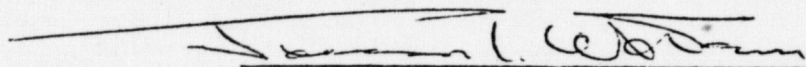
In the language of the Persico opinion at page 4179 the government further asserts that the special attorney's authority stems not solely from the commission letter but also "from other writings, guidelines, practices and oral directions transmitted through a chain of command within the Department."

Without a further indication or offer of such additional material and an explanation of how it would modify the specific limitations manifested in the commission, this assertion can be given no weight.

In conclusion it appears that the subject matter of the four remaining counts in this indictment was beyond the authority of the special attorney to present to the Grand Jury much as it has been held beyond a special attorney's authority to act in another district. See, United States v. Huston, 28 F2d, 451, 455, 456 (N.D. Ohio 1925).

Accordingly, counts Three, Six, Nine and Ten of the indictment are dismissed.

SO ORDERED.


U.S.D.J.

Dated: Brooklyn, New York
August 1, 1975

CERTIFICATE OF SERVICE

October, 1975

I certify that a copy of this brief and appendix
has been mailed to the United States Attorney for the
Eastern District of New York.

Jonathan Hilbermann